In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Petitioners

v.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals in the District of Columbia Circuit

Brief for Respondent Pacific Maritime Association

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QUESTIONS PRESENTED

1. Whether jurisdiction to resolve contentions that a multi-employer maritime collective bargaining agreement forfeits the labor exemption from the antitrust laws lies in the Federal Maritime Commission under section 15 of the Shipping Act, rather than in federal district courts under the antitrust laws.

2. Whether, assuming that the Commission is the proper forum to resolve challenges to labor agreements, the Commission erred when, without a finding that the terms had a significant adverse impact on competition in the marketplace and without a finding of a union-management agreement for the union to impose the terms on outside employers, it denied a labor exemption to collective bargaining provisions setting forth rights and corresponding employer obligations concerning participation in industry-wide fringe benefit programs.

COUNTER STATEMENT OF THE CASE

1. The Parties and the Contentions Below.

This case concerns certain "nonmember" provisions of the Pacific Coast Longshore and Clerks' Agreement ("PCLCA"), the master West Coast, industry-wide collective bargaining contract between Pacific Maritime Association ("PMA") and International Longshoremen's and Warehousemen's Union ("ILWU"). The nonmember provisions eliminated PMA's right to withhold consent for non-PMA employers wishing to utilize a shared ILWU-PMA registered work force to participate in ILWU-PMA multi-employer fringe benefit plans. The terms provided greater equality of benefits and burdens, as between PMA and nonmember employers, arising from use of the ILWU-PMA registered work force, than had prevailed under past "nonmember" agreements (Appendix [hereinafter "App."] 291-93; *see* App. 207-11).

The nonmember provisions were challenged in federal district court under the antitrust laws and before the Commission under the Shipping Act, 1916 (46 U.S.C. § 801 *et*

seq.) by certain public ports[1] who are not members of PMA. The ports, who employ dockworkers in certain marine terminal operations, bargain separately with ILWU. Pursuant thereto, they have shared in rotational employment of the ILWU-PMA registered work force and, with PMA's consent, have participated in the ILWU-PMA multi-employer fringe benefit plans created for this work force.

The nonmember ports contended that the provisions forfeited the labor exemption from the antitrust laws and thereby forfeited a like exemption from section 15 of the Shipping Act (46 U.S.C. § 814) (Appendix to Petition for Certiorari [hereinafter "A.P."] 2a, 46a-47a). Section 15 requires pre-implementation approval of steamship rate conferences and similar anti-competitive agreements, and Commission approval confers an antitrust exemption. Although the ports did not assert that they had attempted to bargain with ILWU for a separate qualified work force, they contended that they had no practical alternative to using the ILWU-PMA registered work force because existing non-registered dockworkers represented by ILWU lacked adequate skills (A.P. 71a, n.18; App. 186-87). Since acceptance of the nonmember provisions was admittedly a condition of using the ILWU-PMA registered work force, the ports objected that the nonmember terms were, as a practical matter, imposed on them and that they were thereby compelled to align themselves with PMA labor policy (*see* A.P. 36a, 59a).

The extent to which the nonmember ports may be in competition with PMA members and the extent to which *acceptance* of the provisions might affect the business of

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1. The nonmember ports have not participated in the proceedings before this Court. The Port of Seattle has not participated in the case since submitting a memorandum to the Commission on March 28, 1974.

the ports or competition, if any, between the ports and PMA members, is not of record and not the subject of findings.[2] If the nonmembers *declined* to accept the terms, however, they would be unable to use the ILWU-PMA registered work force with consequences which the Commission found would have a negative impact on shipping and competition (A.P. 70a-71a).

In addition to the nonmember ports there are nonmember employers, not parties to this proceeding, who compete with some PMA members and who utilize the ILWU-PMA registered work force. PMA members were concerned that these nonmember stevedores—not the nonmember ports who rarely perform stevedoring—were obtaining an advantage by using the registered work force on more favorable terms than PMA members (App. 90-91, 95-97, 102). As these nonmember stevedores did not challenge the terms or participate in the proceedings, there are no findings or evidence evaluating any competitive effects of the terms upon them.

2. The Bargaining History of the Nonmember Provisions.

The nonmember provisions of the PCLCA are rooted in the history of the labor relations of the industry they concern. A 1934 arbitration award of a presidential National

2. There was no evidence or finding that PMA has port members or otherwise represents ports which compete with the nonmember ports here. Some of PMA's members may be competitors or potential competitors for certain marine terminal work performed by the ports, but there was no evidence or finding assessing the nature of that competition, if any, or how or to what degree it might be affected by acceptance of the nonmember terms. The evidence and contentions of the ports focused on effects upon them if they refused to accept the nonmember terms (App. 51-61, 69, 70, 189-92). As the Government points out (Gov't Br. 5), voting control of PMA, which negotiates with offshore unions, is in the carrier members of PMA. There are no findings here of any competitive relationship between the nonmember ports and carrier members of PMA and it is believed that there is no such relationship.

Longshoremen's Board (set forth in Appendix A hereto), settled the bitter 1934 West Coast longshore strike and the San Francisco general strike by decasualizing longshore labor on the West Coast and creating the present ILWU-PMA jointly registered work force. PMA employers[3] (not nonmember employers) were required to hire exclusively from dispatch halls jointly financed by PMA and the union and to give first preference in dispatch to a delimited pool of longshoremen admitted to registration lists by joint PMA/union action.[4]

Registered dockworkers work for different employers on different days, depending on assignment of workers to particular jobs from ILWU-PMA dispatch halls (App. 89, 290). Rotational employment requires central administration, accounting and record keeping, since registered workers, as a result of collective bargaining, receive a single paycheck from PMA, for which PMA is reimbursed by its members (App. 89, 92-93, 121, 122). The registered work force are beneficiaries of multi-employer fringe benefit plans negotiated between and jointly administered by ILWU and PMA. The plans, which constitute a large portion of a registered dockworker's income, create significant administrative problems (App. 89, 90). They require central record keeping to determine which men over their entire working lives are accruing which benefits and which em-

3. The parties to the award were PMA's and ILWU's predecessors.

4. For a history of these developments see M. Keller, *Decasualization of Longshore Work in San Francisco* (W.P.A. Report No. 1-2, 1939), 10-14, 25-50, 122-27 [hereinafter "Keller"]; Larrowe, *Shape-Up and Hiring Hall: A Comparison of Hiring Methods and Labor Relations on the New York and Seattle Waterfronts* (Univ. of Calif. 1955), 96-104, 139-83 [hereinafter "Larrowe"]. Keller states that the union exercises primary control over admission to registration (Keller, *supra*, at 28; Larrowe, *supra*, at 167).

ployers are accruing concomitant man-hour or tonnage assessment liabilities. They require policing to be sure employer obligations are accurately reported and promptly paid.

Since nonmembers offer additional work opportunities it is in the interest of registered dockworkers, assuming substantially similar wages and terms and conditions of employment, to be able to avail themselves thereof. It is also in their interest to receive "credit" under the ILWU-PMA plans and a single PMA paycheck based on time worked for nonmember employers (App. 92-93, 103, 157).

Development of the ILWU-PMA fringe programs for the registered work force led ILWU and nonmembers employing this work force to negotiate participation in some or all[5] of the ILWU-PMA plans, subject to PMA's consent granted in nonmember participation agreements which the present provisions amend (App. 77, 91). Such participation was on terms which PMA came to view as allowing nonmembers, particularly stevedores not parties hereto, to participate in the ILWU-PMA plans on terms less onerous than for members (A.P. 55a-56a, App. 90-92, 95-97, 102). In 1970 PMA's Board resolved to withdraw PMA's consent to participation of nonmembers in the ILWU-PMA fringe plans, giving the nonmember employers the option of setting up their own plans or other arrangements pursuant to negotiations with ILWU or joining PMA under its open membership policy and thereby continuing with the ILWU-PMA plans (App. 104-05).

As the Government recognizes, the collective bargaining history respecting nonmember participation in the plans

5. The nonmember ports here have participated in all the PMA plans (App. 121, 188).

precluded PMA from terminating nonmember participation without bargaining with ILWU (Brief for the Federal Maritime Commission and the United States [hereinafter "Gov't Br."] 9; App. 98, 101, 122-23). The bargaining on the issue opened with the parties at opposite extremes. ILWU asked not only continuance of the prior terms for nonmember participation in the plans, but demanded for the future that PMA accept nonmember participation in all the plans as a matter of right. The opening ILWU bargaining demand of November 16, 1970, read:

> "XVI. Fringe Benefits Contributions
> "The contract to provide that PMA *will accept all* fringe benefit contributions from any employer whether or not such employer is a member of the PMA." [App. 88, 98 (emphasis supplied).]

PMA's counter demand of December 7, 1970, consistently with its Board's resolution, demanded elimination of nonmember participation in the plans (App. 88).

After a long strike based on other issues, the parties were unable to resolve their differences as to nonmember participation and submitted the issue to the Pacific Coast Arbitrator (App. 87, 99-100). Pursuant to his suggestions, they exchanged drafts and on April 15, 1972 reached a compromise (App. 100-02). During the course of the Commission's proceedings herein, further collective bargaining during 1973 resulted in a revised PCLCA which included amended nonmember provisions intended to eliminate the principal objections of the nonmember ports (App. 202-05).

Each of the nonmember provisions reflects an extensive bargaining history and direct ILWU and PMA interests. A delimited registered work force dispatched from the joint dispatch halls, together with control over admission to the

work force and NLRB certification of the bargaining unit,[6] is a principal source of ILWU's power because admission to registration means preferential employment, employment security and substantial benefits under the ILWU-PMA plans (*see* Keller, *supra,* at 25). If the registered work force is too large there will be inadequate work for its members. Similarly, controls on registration determine the size and quality of the work force the employer will have available. If the work force is too small it will be inadequate for peak periods. If it is too large, the massive long-term obligations under the ILWU-PMA plans would become a crippling burden to PMA members who are jointly and severally liable for obligations payable over the life of the plans.

Accordingly, Clause 2 of the nonmember provisions requires nonmember employers wishing to utilize the ILWU-PMA jointly registered work force to conform to the principles first enunciated in the 1934 award and provides:

> "2. The nonmember participant's separate ILWU contract must conform with the provisions hereof [e.g., with the Nonmember Participation Agreement itself], *and the provisions of the PCLCA governing the selection of men for inclusion in the joint work force.*" [App. 291 (emphasis supplied).]

6. *Shipowners Ass'n of the Pacific Coast,* 7 N.L.R.B. 1002 (1938), *petition to review denied sub nom. American Federation of Labor v. NLRB,* 103 F.2d 933 (D.C. Cir. 1939), *aff'd.* 308 U.S. 401, (1940). The NLRB certified the ILWU as the exclusive bargaining agent for and defined the bargaining unit as *"the workers who do longshore work* in the Pacific Coast ports of the United States *for the companies which are members of* [PMA's predecessor organizations]". (*Id.* at 1041 [emphasis supplied].) Non-member employers, who share these same PMA employees, are not members of the employers' association but, by employing the very "workers who do longshore work . . . for [PMA members]" they fall within the bargaining unit as certified by the NLRB.

Through joint control of dispatching to particular jobs, ILWU has implemented its concept of "industrial democracy with one type of citizen" founded on "equitable work assignments" (*Waterfront Employers Ass'n,* 26 War Lab. Bd. Rep. 514, 538-40 (1945)), namely an equitable allocation of soft jobs, overtime, dirty and dangerous jobs and income equality. These issues involve philosophical roots which the War Labor Board found "strike deep" (*id.* at 538).[7] Similarly, PMA, during times of labor shortage, has long operated a gang allocation system under which the delimited work force is allocated among various employers.

Clause 3 of the nonmember provisions reflects these concerns and provides in part:

> "3. A nonmember participant will share in the use of the joint work force upon the same terms as apply to members of PMA. For example a) the nonmember participant shall obtain men on the same basis as a PMA member from the dispatch hall operated by ILWU and PMA through the allocation system operated by PMA." [App. 291.]

A closely related historical concern is ILWU's opposition to and the employers' continuing desire for "steady" gangs. The success of the union's first organizing campaign was based in significant part on promises to eliminate steady

7. As Larrowe points out, "The security of a union as an institution is directly linked to its ability to control the jobs within its jurisdiction. . . . The test, then, of the hiring hall as far as the ILWU is concerned, is *its effect on the union's ability to control the jobs on the waterfront.*" (at 174-75 [emphasis supplied].) Jobs are rotated by ILWU through the dispatch hall to achieve "equalization of earnings" among registered dockworkers (Larrowe at 143), and ILWU control allows it to "expand the worker's productive years by consciously reserving the easier jobs for older men and for men who have been injured." (Larrowe at 170; see *id* at 144.)

gangs, which longshoremen associated with speed-ups.[8] The War Labor Board in 1946 found steady gangs to be a fundamental issue for ILWU and recommended denial of the employers' demand for "restoration of steady gangs" (*Waterfront Employers Ass'n, supra,* 26 War Lab. Bd. Rep. at 537-38, 565).

These historical concerns are relevant to clause 5 of the nonmember provisions, which clause provides that nonmember employers utilizing the ILWU-PMA jointly registered work force, may

> "obtain and employ a man in the joint work force on a steady basis in the same way a member may do so." [App. 291.]

It also provides that steady men working primarily or exclusively for nonmembers and thus largely unavailable to PMA employers will nonetheless participate in the ILWU-PMA Pay Guarantee Plan.[9]

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8. Larrowe, *supra,* at 162. "In 1935, the union insisted that company gangs be eliminated and, since then, both longshoremen and dockworkers have worked for one employer only long enough to complete the particular job for which they are dispatched.

"The employers vigorously opposed the elimination of steady gangs. The union conceded that steady gangs would increase efficiency for certain employers and eliminate hiring problems for certain longshoremen, but argued that these very virtues emphasized the countervailing vices of favoritism and inequality of work opportunities: 'Equalization is the fundamental objective of the union, and equilization includes equal requirements of reporting, equal division of the desirable jobs, equal acceptance of unpleasant tasks, equal regularity as well as quantity of employment, and equal sharing of the work when times are bad'." (Larrowe at 159-160.)

9. "5. A nonmember participant may obtain and employ a man in the joint work force on a steady basis in the same way a member may do so. When such participant employs a man to work on a steady basis, it shall notify PMA immediately. On request from PMA, each such participant shall furnish to PMA a list of men it is using on a steady basis. Steady men shall participate in the Pay Guarantee Plan in accordance with the rules that are adopted by PMA and ILWU" (App. 291-92).

ILWU, like other unions, is jealous of work jurisdiction. (*See* App. 153-55, 220; *Intercontinental Container Transp. Corp. v. New York Shipping Ass'n,* 426 F.2d 884 (2d Cir. 1970).) Clause 6 of the Nonmember Agreement App. 292), now moot as a result of an NLRB decision,[10] incorporated portions of the "container freight station supplement" to the PCLCA (App. 239-41) and reflects that ILWU concern. The incorporated provisions were an attempt to preserve ILWU work jurisdiction over off-dock stuffing of marine containers which was being performed increasingly by teamsters.

As the court of appeals noted, "the union in the past" has been able "to whipsaw by striking PMA but continuing to work for nonmembers" (A.P. 4a, App. 95-97). In the case of a shared work force, this meant that normal economic pressure on union members during strike or lockout was diluted to the extent that registered workers continued to be employed by nonmember employers. Nonmember clauses 3(b) and (c)[11] provide that in event of strike or lockout or partial work stoppage, labor will not be dis-

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10. The NLRB held that the incorporated provisions of the PCLCA violated the National Labor Relations Act. *International Longshoremen's and Warehousemen's Union (California Cartage Co.),* 208 N.L.R.B. 994 (1974), *enforced without opinion sub nom. International Longshoremen's and Warehousemen's Union v. NLRB,* 515 F.2d 1017 (D.C. Cir. 1975).

11. "b) if a work stoppage by ILWU shuts off the dispatch of men from the dispatch hall to PMA members, nonmember participants shall not obtain men from the dispatch hall,

"c) if during a work stoppage by ILWU, PMA and ILWU agree on limited dispatch of men from the dispatch hall for PMA members, such limited dispatch shall be available to nonmember participants.

"The essence of b) and c) of this section is the acceptance by nonmember participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against non-member participants." (App. 291).

patched from the dispatch hall to nonmember employers utilizing the ILWU-PMA jointly registered work force on any different terms than for PMA employers.

The remaining substantive clauses of the nonmember provisions provide for participation by registered dockworkers and the nonmember employers thereof in the range of multi-employer, ILWU-PMA fringe benefit programs.

Clause 7[12] requires nonmembers choosing to utilize the registered work force to undertake to participate in all the outstanding fringe plans, to make payments at the same rates and the same times as to PMA members, and to be subject to compliance audits as to their reporting of hours worked, tonnage handled, or other basis for calculating employer financial obligations to the plans. Clause 8[13] requires use of the PMA central pay and records system,

12. "7. The nonmember participant shall participate in the ILWU-PMA Pension Plan, the ILWU-PMA Welfare Plan, the PMA Vacation Plans (longshoremen and clerks, and walking bosses/foremen) and the ILWU-PMA Guarantee Plans (longshoremen and clerks, and walking bosses/foremen) in accordance with the terms applicable to such participation. Such nonmember shall make payments into these Plans at the same rates and at the same times as members of PMA are to make the respective payments. Attached are statements of terms and conditions currently in effect with respect to such participation. Nonmember Participants shall be subject to the same audits as members of PMA" (App. 292).

13. "8. The nonmember participant shall use the PMA central pay system and central records office and must sign the standard forms of participation documents for the central records office and central pay system. Amounts due with respect to the central pay and central records system shall be paid to PMA at the time and in the manner prescribed for members of PMA.

"Note: The hours for which pay is distributed through the central pay office to any man within the joint work force, with respect to his being used by such nonmember pursuant to the terms hereof, shall be deemed hours of work for a PMA member company for purposes of determining the individual longshoreman's eligibility for vacations, welfare, pensions, pay guarantee, promotion, transfer, advancement in registered status, seniority, and all other aspects of his work history as a member of the joint work force." (App. 292-93).

and for reimbursement of payrolls paid by PMA to the registered men. This procedure enables registered dockworkers to participate in the industry-wide single paycheck, social security and withholding system applicable when they work for PMA members. Further, as to fringe benefits keyed to hours worked and employer payments based on hours worked, it enables PMA, which is responsible for record keeping, and the ILWU-PMA staff responsible for administrating the fringe plans, to perform their essential functions. Clause 9[14] requires nonmembers to pay amounts equal to dues and assessments paid by PMA members to support administration costs ranging from negotiation of the plans to general overhead and administration. Clauses 4 and 10 assure payment of nonmember obligations to fringe programs and for payroll if a nonmember ceases to employ the registered work force or becomes delinquent.[15]

When the PCLCA was renegotiated in 1973, the 1972 nonmember provisions (App. 206-65) were revised (App. 290-93) to alleviate concerns of nonmember employers

14. "9. Each nonmember participant shall pay to the PMA an amount equal to the dues and assessments on the same basis that a PMA member would pay. Payments shall be made at the same time the member would pay" (App. 293).

15. "4. Should any nonmember participant cease to have the right to obtain men through the allocation and dispatching system, such nonmember shall nevertheless continue under a duty to meet all of its obligations based upon its use of the joint work force including accrued obligations for PMA assessments and dues, obligations for retroactive and current assessments for fringe benefits, obligations to meet liabilities under paragraph 10 hereof, and all other obligations with respect to the pay of workers paid through the central pay office during the period of its participation in the use of the joint work force" (App. 291).

"10. If a nonmember participant becomes delinquent under paragraphs 7, 8, or 9 hereof no joint work force workers shall be furnished to the delinquent nonmember" (App. 293).

(App. 204). A note to clause 3 of the 1972 agreement,[16] which the nonmembers argued required them to "forego favorable local labor contract provisions with resultant higher costs" (Gov't Br. 12), was eliminated in the 1973 revised agreement (*compare* App. 201-62 *with* App. 291 *and* App. 204). Language in clause 9 of the 1972 agreement, which arguably made PMA strike policy applicable after termination of the ILWU-PMA master contract, was eliminated. (*Compare* App. 263 *with* App. 293; *see* App. 205.)[17]

3. The Commission's Proceedings and Decision.

Although, as the court of appeals found, the nonmember ports' complaint "boils down to an accusation that they are being forced against their wills into a multi-employer unit" (A.P. 37a),[18] the ports did not attempt to bargain with ILWU for a different qualified work force and did not challenge the provisions before the NLRB as compelling membership in an employer organization in a manner prohibited

16. The 1972 agreement read: "Note: If a prospective nonmember participant has an agreement with the ILWU which provides for utilization of the joint work force at terms and conditions of employment more favorable to the nonmember than those provided under the PCLCA, including the CFSS, such nonmember must alter that agreement to conform to the PCLCA, including the CFSS, in order to become a nonmember participant" (App. 261-62).

17. In addition, ILWU and PMA eliminated language in clause 6 of the 1972 agreement which nonmember port bodies contended was inconsistent with their status as public bodies.

18. "Supplemental Memorandum of Understanding No. 4 is challenged not because it will compel discriminatory rates, but because it will allegedly force nonmembers into accepting the same wage, fringe benefit and work stoppage terms as those negotiated by the multi-employer unit" (A.P. 36a; *see* Gov't Br. 21).

"FMC has thus accepted jurisdiction to determine shipping implications of an agreement which perhaps imposes an improper bargaining unit" (A.P. 37a).

by section 8(b)(4)(i)(A) of the National Labor Relations Act (29 U.S.C. § 158(b)(4)(i)(A)). Instead, in July of 1972, the ports (1) filed a complaint in federal district court alleging that the "nonmember" provisions of the contract violated the antitrust laws (A.P. 8a-9a, n.11) and forfeited the labor exemption therefrom, and (2) filed a petition for investigation with the Commission alleging that the same provisions required pre-implementation approval under section 15 of the Shipping Act and opposing approval.

The Commission commenced its section 15 challenge to the April 25, 1972 nonmember provisions on September 6, 1972. Its order of investigation addressed not only possible section 15 jurisdiction over these provisions, to which the nonmember ports had objected, but over all or any part of the entire master collective bargaining contract — the PCLCA—most of which had long since been implemented.[19] The Commission thereafter intervened in and obtained a stay of the court antitrust action, pending the Commission's determination of its own jurisdiction (A.P. 51a).

On October 19, 1972, approximately six months after ILWU and PMA had adopted the nonmember provisions, the Commission "severed" for "expeditious determination" (App. 23) the question of its section 15 jurisdiction over the entire PCLCA and further broadened its order of investigation to include the question whether any provisions of the entire PCLCA

19. The Commission's order posed the question:

"1. Whether the master collective bargaining contract and the Supplemental Memorandum of Understanding No. 4 entered into by PMA and the ILWU embody any agreements between and among the members of PMA, which agreements are subject to the requirements of Section 15 of the Shipping Act, 1916."

> "should, if found subject to the requirements of section 15 of the Shipping Act, 1916, and found not within any labor exemptions, *be approved, disapproved, or modified* pursuant to that section." [App. 23 (emphasis supplied).]

On January 30, 1975, five months before the 1973 PCLCA expired,[20] the Commission held that the nonmember provisions "at issue here" forfeited the labor exemption and hence could not be carried out unless the Commission first approved or modified the provisions under section 15's "public interest" and other standards. However, the section 15 status of the rest of the PCLCA, challenged by the Order of Investigation, was not discussed or directly resolved, except for a sentence which assumed that the balance of the PCLCA, or at least those PCLCA provisions creating "the amount and kind of fringe benefits to be paid," could be implemented (*see* A.P. 72a).

The Commission first concluded that the nonmember provisions were "factually substantially similar to the assessment agreement" among employers in *Volkswagen* (A.P. 54a), which had been held to have pass-through and arguably discriminatory effects on rates subject to Commission regulation and were therefore subject to section 15. (*Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261 (1968); *see New York Shipping Ass'n v. Federal Maritime Comm'n*, 495 F.2d 1215 (2d Cir. 1974), *cert. denied*, 419 U.S. 964 (1974).) Next, the Commission determined that the nonmember provisions forfeited the labor exemption under four "criteria" previously promulgated by the Commission as a distillation of this Court's labor/

20. The current PCLCA includes the 1973 nonmember provisions.

antitrust decisions in *Pennington, Jewel Tea* and *Allen Bradley*[21] (*United Stevedoring Corp. v. Boston Shipping Ass'n*, 16 F.M.C. 7 (1972) [hereinafter *"Boston II"*]).

The Commission's premise was that failure of a collective bargaining agreement to meet any one of its four criteria "is sufficient to consider withholding a labor exemption" (App. 58a). It held that the nonmember provisions of the PCLCA failed to meet two of the criteria because:

> "the matter of the Revised Agreement is not a mandatory subject of bargaining." [App. 62a.]

and

> "it . . . imposes terms and conditions upon persons outside the bargaining group." [App. 63a.][22]

The Commission focused primarily upon the issue of imposition of the terms by stressing "the possible adverse impact" on the nonmember ports if they elected *not* to accept the terms and to forego use of the ILWU-PMA

21. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945). The four criteria are

"(1) The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are 'arms-length' or 'eyeball to eyeball'.

"(2) The matter is a mandatory subject of bargaining e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.

"(3) The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.

"(4) The union is not acting at the behest of or in combination with nonlabor groups, i.e. there is no conspiracy with management" (A.P. 58a).

22. The Commission summarized its holding by stating:

"In view of our finding here that the Revised Agreement is not entitled to a labor exemption *by virtue of the fact that* it imposes terms on parties outside the bargaining unit and is not a subject of mandatory bargaining, we find it unnecessary to resolve the merits of the 'conspiracy' issue" (A.P. 69a [emphasis supplied]).

registered work force (A.P. 70a). The Commission noted that "skilled labor can only be gotten from the ILWU [registered] work force" (A.P. 71a, n.18) and that ILWU "would undoubtedly" picket the ports if non-ILWU labor were used. Thus, a failure to accept the nonmember terms "could well result in the closing of . . . [nonmember] facilities . . ." by ILWU action (A.P. 70a).

Consistently with its "criteria," the Commission's decision did not purport to consider or assess competitive or other marketplace effects if the nonmembers accepted the terms and continued to use the ILWU-PMA registered work force. There were no findings that acceptance of the provisions by nonmembers constituted price fixing, market allocation, ruinous predatory terms or any other

> "direct restraint on the business market [which] has substantial anticompetitive effects... that would not follow naturally from the elimination of competition over wages and working conditions." [*Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616, 625 (1975).]

The Commission made one reference to effects on nonmembers of their accepting the terms, based on the premise that the nonmember provisions involved "elimination of all local agreements between nonmembers and the ILWU" (A.P. 67a-68a), a result which the nonmember ports in 1972 had argued flowed from the Note to clause 3 of the 1972 nonmember provisions, but which was eliminated in the 1973 revision (*see* n.39 and accompanying text, *infra*). Based on that premise, the Commission concluded that acceptance of the terms "would result in higher costs to ... the nonmember ... than to ... PMA members" because "differences in methods of operation and locality" were

"ignored" (A.P. 68a),[23] but it did not determine what such costs were and did not find that any PMA member similarly situated would have had different labor costs or that any higher labor costs were intended to or would in fact injure the ports or affect their position vis-a-vis any competitor.

Because the Commission found the terms to have been imposed as a practical matter by the very value of the registered work force and by ILWU's anticipated hostility to alternatives, no PMA-ILWU conspiracy or other agreement by which ILWU undertook to impose the terms was deemed necessary to the decision, and the Commission disavowed any such finding (A.P. 69a). Specifically, the Commission did not find any PMA-ILWU agreement or understanding precluding ILWU from bargaining with nonmembers for:

(1) creation of a newly constituted qualified work force represented by ILWU;

(2) terms sufficiently attractive to cause skilled or other particularly desirable registered workers to withdraw their registration in favor of direct employment by nonmembers;

(3) any other alternative labor supply, or labor force terms.

Apart from the application of its "criteria," the Commission's balancing of conflicting statutory policies concluded generally that the terms had a "minimal effect on the collective bargaining process" but, in view of the practical consequences believed to follow if the terms were not accepted, they had

> "a potentially severe and adverse effect upon competition under the Shipping Act as would justify our

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23. In a footnote (A.P. 78a, n.16), the Commission cited increased travel time from Seattle for checkers traveling to two ports in the event that local contracts with ILWU were "eliminated," but it did not find that any PMA member at those ports would be treated differently (*see* App. 56-57).

consideration of its approvability under the standards thereof." [A.P. 70a.]

In reaching its conclusion the Commission rejected the position of its Hearing Counsel and the dissent that the case presented primarily labor and antitrust questions which were outside the Commission's expertise and which should be resolved by the NLRB or the courts (A.P. 49a-51a, 73a-74a).

4. The Court of Appeals' Decision.

PMA and ILWU urged on appeal that the Commission's "criteria" and their application were contrary to this Court's labor exemption decisions and further urged as a matter of policy that application of the pre-implementation approval procedures of section 15 was inconsistent with national labor policy. Because "reconciliation of the competing policies and statutory schemes" necessary to apply the labor exemption from the antitrust laws is a difficult and delicate task (A.P. 2a), the court reversed on the second ground, ruling that courts under the antitrust laws, rather than the Commission under section 15 of the Shipping Act, had jurisdiction to determine such challenges to maritime collective bargaining. The court's holding followed this Court's distinction in *Volkswagen* between labor related, inter-employer agreements affecting regulated ocean rates and the collective bargaining agreement itself. The court questioned but did not reach the Commission's application of this Court's labor exemption decisions to the nonmember provisions (A.P. 40a; *see* A.P. 3a, n.1) and questioned the Commission's premises that the revised terms eliminated "local" nonmember/ILWU contracts inconsistent with the PCLCA (A.P. 5a, n.5, 36a, n.34) and were not mandatory bargaining subjects (A.P. 3a, n.1, 38a).

Alternatively, the court held that the particular provisions were not subject to section 15, since, unlike *Volkswagen* and *New York Shipping*, the terms did not produce discriminatory rates of Shipping Act concern, but only contentions that nonmembers would be compelled to align themselves more closely with PMA as a condition of continuing to employ the ILWU-PMA jointly registered work force. The nonmember provisions accordingly involved primarily labor issues of concern to the NLRB and "at worst . . . *Pennington* considerations" for an antitrust court (A.P. 36a-37a).

SUMMARY OF ARGUMENT

Whether attacks on maritime collective bargaining contracts for violating legal standards governing competition in the marketplace must be made before courts under the antitrust laws, or before the Commission under the pre-implementation approval requirements of section 15 of the Shipping Act should depend on whether national labor policy is more compatible with antitrust or with Shipping Act procedures. Although section 15 does not explicitly include or exclude collective bargaining agreements, its wording and legislative history demonstrate a Congressional assumption that labor agreements do not fall within section 15.

At heart, this case involves "strong labor considerations" (A.P. 38a) and presents primarily labor issues. The collective bargaining agreement at issue has no Shipping Act nexus apart from the fact that most of the employer parties thereto are persons subject to the Act. Although the Commission recited general conclusions as to Shipping Act effects and analogized the bargaining terms to the purely inter-employer agreement in *Volkswagen*, the substance of

the terms and the issues here are fundamentally different from *Volkswagen*. The Commission did not find that the terms here created costs which in turn necessarily altered rates or charges subject to Shipping Act regulation or created discriminatory rates. The attack on the bargaining terms made clear that objections thereto were based on opposition to imposition of the terms, rather than to the substance or the marketplace effects of the terms themselves, and hence amounted to a contention under section 8(b)(4)(i)(A) of the National Labor Relations Act (29 U.S.C. § 158(b)(4)(i)(A)) that nonmembers of the employers' association were compelled to align themselves with an employer bargaining unit.

A challenge to collective bargaining provisions, under laws regulating competition in the marketplace, necessarily involves a delicate balancing of national labor and antitrust policy, a function which courts are better equipped to perform than agencies. The Commission attempted this balancing function under this Court's labor/antitrust decisions, rather than under a different Shipping Act test, but the Commission has neither a statutory mandate nor expertise under the labor laws or under the antitrust laws. By contrast, federal district courts are experienced in applying both statutes and in reconciling such competing statutory schemes.

The pre-implementation approval requirements of section 15 are inconsistent with national labor policy and collective bargaining realities, which require prompt implementation of labor bargains to terminate or avoid labor strife. Since any section 15 jurisdiction to approve labor agreements, either temporarily or permanently, must admittedly be based upon a determination that the agreement forfeits the labor exemption, no section 15 approval

permitting implementation of the agreement is possible until this threshold jurisdictional determination is made. The complexity and difficulty of resolving even the threshold jurisdictional issues create intolerable delays and uncertainties for the labor bargain. Further, the power of the Commission to disapprove, modify, interpret and otherwise regulate section 15 agreements found subject to its jurisdiction is inconsistent with national labor policy favoring collective bargaining free from governmental substantive controls and second-guessing.

Alternatively, assuming that the proper analysis here was whether the labor considerations presented by the bargaining provisions outweighed Shipping Act considerations, the court of appeals properly concluded, based on the Commission's own findings, that there was a strong labor nexus and a weak or nonexistent Shipping Act nexus. This determination, based on fundamental questions of law and balancing of competing national policies, is outside the Commission's expertise and is not committed to its discretion.

In any event, the Commission erred as a matter of law in applying this Court's labor/antitrust decisions. It denied a labor exemption without threshold findings or evidence that the terms themselves had significant or adverse effects on competition in the marketplace prohibited by the antitrust laws. The Commission erroneously focused exclusively on whether the employers outside the employer bargaining group had a sufficiently attractive alternative to accepting the terms and on what the union would do if the terms were not accepted. It ignored the fact that the terms themselves were consistent with this Court's decisions under the antitrust laws, requiring that access to certain valuable, shared industry resources be available to

outsiders, but only if the outsiders share equally in the burdens as well as the benefits of the resource. The Commission further erred in its premise that the terms here, providing the basis on which registered dockworkers would get the benefit of ILWU-PMA multi-employer fringe plans on days when they work for other employers, were not mandatory bargaining subjects. Finally, the Commission erred in denying the labor exemption on the basis of an anticipated imposition of terms on other employers by the union without findings or evidence of a conspiracy or other agreement by which the union agreed with competing employers to impose the terms.

ARGUMENT

I. Section 15 Does Not Shift Jurisdiction to Determine Challenges to Maritime Collective Bargaining as Being Anticompetitive from the Courts to the Federal Maritime Commission.

A. Section 15 Not Applicable by Its Terms, by Its Legislative History or by Consistent Administrative Interpretation.

Section 15 and its legislative history[24] make no reference to collective bargaining agreements. As with decisions holding agreements to consolidate or merge ocean carriers to be outside section 15, the issues here cannot be resolved by the bare wording of the statute. (*See Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 731-32 (1973); *American Mail Line, Inc. v. Federal Maritime Comm'n*, 503 F.2d 157 (D.C. Cir.), *cert. denied*, 419 U.S. 1070 (1974).)

Unions are not persons subject to the Shipping Act.

24. The "Alexander Report" (H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914)) which contains the legislative history of the Shipping Act as originally enacted was issued in 1914. The same Congress made the first attempt at a labor exemption (Clayton Act § 6, 15 U.S.C. § 17). The Shipping Act, including section 15, was revised in 1961 and the principal legislative history is set forth in "Index to the Legislative History of the Steamship Conference/Dual Rate Law," S. Doc. No. 100, 87th Cong., 2d Sess. (1962).

(*See* 46 U.S.C. § 801.) Since section 15 applies only to agreements or understandings between persons subject to the Act, it is reasonable to suppose that, had Congress wished to include collective bargaining provisions in section 15, the unions who are always parties to such agreements would have been so defined.[25] Although a clear policy of section 15 should not be defeated by mechanically adding a non-Shipping Act person as a party to an agreement otherwise subject to section 15,[26] the fact that a union is by definition always an essential party is a compelling reason not to subject bona fide collective bargaining agreements to section 15, particularly since there are adequate remedies under the antitrust laws which do not involve pre-implementation approval.

In 1938 and 1941, Congress demonstrated its assumption that section 15 was not applicable to maritime collective bargaining agreements. In section 1005 of the Merchant Marine Act of 1936 (52 Stat. 967 (1938)) Congress provided for filing (but not for pre-implementation approval) of maritime collective bargaining agreements with a special Maritime Labor Board independent of the Commission's predecessor agencies then administering both the Shipping Act and the Merchant Marine Act of 1936. A 1941 Report of the House Merchant Marine Committee, which

25. Assertion of the power to delay, to modify or to disapprove the very agreement that it is the union's function to bargain is to assert jurisdiction in any meaningful sense over the union itself. Moreover, if a union's fundamental rights are affected it will intervene formally in the proceeding as ILWU did here, and the Commission will thus routinely assume jurisdiction over the union as a party as well as over the union's agreement.

26. The Court recognized in *Volkswagen*, for example, that through rate agreements between ocean carriers and railroads, who are not regulated under the Shipping Act, were contemplated by the Act to fall within section 15 (*see* 390 U.S. at 275-76).

had authored the Shipping Act, proposed a two-year extension in the life of the Board and stated that the Board was the

> "only Government agency with which copies of all labor agreements are required to be filed." [H.R. Rep. No. 354, 77th Cong. 1st Sess. (1941).]

There is no history or consistent administrative interpretation as to application of section 15 to labor agreements. Most labor/antitrust policy collisions involving the maritime industry have been resolved by federal courts under the antitrust laws or by the NLRB under the labor laws.[27] Although since *Volkswagen* it has taken jurisdiction over purely inter-employer cost allocation agreements, there are only two prior reported cases in which the Commission purported to enter the collective bargaining arena. In one case the Commission assumed section 15 jurisdiction over a *Volkswagen*-type inter-employer labor cost assessment formula later incorporated into a collective bargaining contract. (*New York Shipping Ass'n v. NYSA/ILA Man-Hour/Tonnage Method of Assessment,* 16 F.M.C. 381 (1973), *aff'd sub nom. New York Shipping Ass'n v. Federal Maritime Comm'n,* 495 F.2d 1215 (2d Cir. 1974), *cert. denied,* 419 U.S. 964 (1974).) In the other, the Commission first assumed section 15 jurisdiction over the articles of incorporation of an employers' bargaining group and over a labor gang allocation system, set forth in a collective

27. *See Intercontinental Container Transp. Corp. v. New York Shipping Ass'n,* 426 F.2d 884 (2d Cir. 1970); *Commerce Tankers Corp. v. National Maritime Union,* 553 F.2d 793, 803 (2d Cir. 1977); *International Longshoremen's Ass'n v. NLRB,* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 50 L. Ed. 2d 753 (1977); *International Longshoremen's and Warehousemen's Union (California Cartage Co.),* 208 N.L.R.B. 994 (1974), *enforced without opinion sub nom. International Longshoremen's and Warehousemen's Union v. NLRB,* 515 F.2d 1017 (D.C. Cir. 1975).

bargaining contract and somewhat similar to the PMA system referred to in clause 3 of the nonmember provisions. (*United Stevedoring Corp. v. Boston Shipping Ass'n,* 15 F.M.C. 33 (1971) [hereinafter *"Boston I"*].) After remand by the First Circuit, accompanied by an expression of "astonishment" at the Commission's decision (*Boston Shipping Ass'n v. United States,* 8 S.R.R. 20,828 (1st Cir. 1972)), the Commission disclaimed section 15 jurisdiction over the same provisions. (*See Boston II, supra,* 16 F.M.C. 7.)

B. Volkswagen Is Inconsistent with the Commission's Decision.

The Government has not urged or defended the Commission's conclusion that the present collective bargaining provisions were "factually substantially similar to the [inter-employer] assessment agreement" held subject to section 15 in *Volkswagen* (A.P. 54a). *Volkswagen* had "emphasized" that the decision was not to be construed as applicable to the PMA-ILWU collective bargaining agreement.

> "It is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15. Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity." [390 U.S. at 278.]

Both *Volkswagen* and *New York Shipping, supra,* involved employer assessment formulae found to have direct and seemingly discriminatory pass-through effects on regulated shipping rates (A.P. 35a-36a).[28] By contrast, consistent with the Commission's findings (A.P. 62a, 65a), the court here characterized the present case as boiling down to contentions that nonmember employers were in effect compelled to align themselves with an employer bargaining unit (A.P. 35a-36a). Since the Commission found no inter-employer agreement here which allocated costs and found no pass-through, arguably discriminatory effects on regulated shipping rates, this case involves issues fundamentally different than *Volkswagen* even apart from the fact that this agreement was collectively bargained.

C. Delicate Accommodations of Labor and Antitrust Policy Are Intrinsically Best Performed by Courts.

A determination whether collective bargaining provisions forfeit a labor exemption involves indisputably "delicate" problems of "accommodation between federal labor and antitrust policy" (*Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra,* 421 U.S. at 636), and "complex and significant questions" which have "aptly been called 'a troublesome and unruly issue'." (*Commerce Tankers Corp. v. National Maritime Union, supra,* 553 F.2d at 803.)

Reconciliation of such competing statutory objectives is a task which federal district courts are best equipped to perform and for which only the courts have the necessary

28. This Court stated in *Volkswagen:*

"There is no question that the assessment agreement necessarily affected the cost structures of, and the charges levied by, individual Association members. Most, though not all, of the stevedoring contractors and terminal operators did pass the assessment on. . . . In the case of Terminals, the assessment it had to pay on Volkswagen automobiles was more than twice its profit margin" (390 U.S. at 273; *see* 390 U.S. at 288 (Harlan, J., concurring)).

expertise and broad experience in applying both statutes. A specialized administrative agency, whose job is regulating ocean transportation and which has no labor and very limited antitrust experience, is poorly qualified for this task.

Unlike the Commission, the NLRB has a high degree of expertise in labor matters and explicit statutory jurisdiction to resolve many of the fundamental issues presented by the labor/antitrust cases, yet this Court has consistently determined that, at the point of collision between labor and antitrust policy, it is the courts, not the NLRB, which must resolve these questions. (*Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra,* 421 U.S. at 626, 633-34; *Local 189, Meat Cutters v. Jewel Tea Co., supra,* 381 U.S. at 684-88.) Consistently, *Connell* held that state antitrust statutes are preempted so that the federal courts can resolve the delicate problems presented by applying this Court's "carefully tailored" standards for reconciling labor policy with federal antitrust laws, not by having another forum applying the policies of yet a third statute whose standards or procedures "may represent a totally different balance between labor and antitrust policies" (421 U.S. at 635-36). (*See Teamsters Local 24 v. Oliver,* 358 U.S. 283, 295 (1959).)

To its credit, both here and in *Boston II,* the Commission purported to apply criteria which it believed represented the test for a labor exemption from the antitrust laws articulated in the *Allen Bradley, Pennington* and *Jewel Tea* cases, not some different Shipping Act policy balancing test.[29] However, in explaining here why the Commission

29. In *Boston II,* the Commission explicitly described its "criteria" as being *"criteria for determining the labor exemption from the antitrust laws and which we herewith adopt. . . ."* (emphasis supplied). It identified the criteria as having "evolved" from this Court's labor/antitrust decisions (16 F.M.C. at 12) and so identified them in this case (A.P. 58a).

rather than the courts should determine the labor exemption question if presented in a maritime context, the Government now contends that determination of a labor exemption involves "primarily" a balancing of "labor and *Shipping Act interests*" in which the Commission merely "take[s] account of" the antitrust laws (Gov't Br. 19, 21, 28, 36, 40, 53 [emphasis supplied]). Once it is assumed that collective bargaining agreements are subject to section 15 approval Shipping Act considerations would be applicable to the approvability question. However, it is unclear what Shipping Act policies or tests, differing from this Court's labor exemption decisions under the antitrust laws, would or should govern whether maritime collective bargaining is within the labor exemption (*see* Gov't Br. 40).

If there are no differences between the Government's proffered special Shipping Act balancing test and this Court's labor exemption decisions under the antitrust laws, there is no ground for contending that Shipping Act policy requires the Commission rather than the courts to assume jurisdiction to resolve the labor exemption question. On the other hand, if there *are* differences between this Court's labor exemption decisions and the Government's concept of a Shipping Act balancing test, the shift to a Shipping Act test, under which the Commission performs the balancing, conflicts with *Connell*. *Connell* rejected the application of state antitrust law precisely because bringing in a third statutory scheme or a state court forum would frustrate national labor policy and the Court's careful line-drawing. Bringing in the Shipping Act, and with it the Commission, creates significantly worse problems, first because of section 15's pre-implementation approval procedures and second because the Government vigorously contends that the consequence of vesting jurisdiction in the

Commission is that the decision becomes a matter of agency discretion which the courts can only review for abuse of discretion (Gov't Br. 21, 25-26, 41).

Unlike federal courts, which "are themselves not without experience" in labor matters (*Local 189, Meat Cutters v. Jewel Tea Co., supra,* 381 U.S. at 686), the Commission has no expertise in and no statutory jurisdiction over labor matters. (*See* Morse, Commissioner, dissenting, A.P. 74a, n.21.) It is anomalous for such an agency to pass upon whether subjects are mandatory subjects of bargaining (*compare* A.P. 59a-62a *with* A.P. 3a, n.1), whether bargaining was conducted in good faith (A.P. 59a), whether a union is likely to picket or strike to impose terms (A.P. 70a) and whether a union had a legitimate

> "interest in obtaining uniform fringe benefits and access for all employees to joint hiring hall accounting procedures . . ." [A.P. 3a, n.1.]

The Commission's prior venture into the collective bargaining arena in the *Boston* cases, in which it adopted the four brief "criteria" applied here, was a debacle. The case illustrates not some peculiar failing of the Commission but that an agency cannot be expected to resolve difficult policy conflicts between two statutes which it does not administer and with which it is unfamiliar.

In *Boston I* (15 F.M.C. 33), approximately two years after collective bargaining had been concluded and implemented, the Commission assumed section 15 jurisdiction over bargaining provisions concerning allocation of longshore gangs and over the formative articles and by-laws of an employers' association. As here, the Commission viewed the bargaining provisions as a private matter among employers and of "little or no concern to the union" (15 F.M.C. at 45; *see* A.P. 60a). The First Circuit, in remand-

ing, found this conclusion "plainly erroneous" and expressed its "astonishment" at the ruling. (*Boston Shipping Ass'n v. United States, supra,* 8 S.R.R. at 20,829 n.3, 20,830.) The court quoted with approval the Justice and Labor Departments' warning that

> "The process of collective bargaining involves a give-and-take, with one party making a concession on one subject in return for obtaining a concession on another subject. It is difficult, if not impossible, for the parties to make a meaningful judgment as to the kind of bargain they are negotiating if one or more of the key provisions on which agreement turns is subject to invalidation by the Commission. Moreover, the fact that Commission approval would have to be obtained before the agreement could be put into effect would necessarily delay — for the period of the Commission hearing and decision and possible court review — the implementation of the agreement; and this delay may, in turn, cause industrial strife." [8 S.R.R. at 20,831.]

In *Boston II* (16 F.M.C. 7), the Commission reversed itself, upholding a labor exemption and disclaiming section 15 jurisdiction over bargaining provisions which by then were three years old. It vowed to follow a Justice Department suggestion to initiate a rule-making proceeding to

> "exempt for the future this class of agreements from some or all of the requirements of section 15..., thereby not jeopardizing collective bargaining by any threat of pre-approval implementation penalty. This we intend to do." [16 F.M.C. at 15.]

As the dissent here pointed out, no rule-making has so much as been announced (A.P. 74a, n.20).

Boston II is the source of the Commission's distillation of the labor exemption decisions of this Court into four

brief criteria, two of which it purported to apply in the instant case. Although the court of appeals here found it unnecessary to determine whether these criteria accurately reflected this Court's decisions, it did

> "caution the Commission, however, that parsing the Court decisions in this highly complex area may oversimplify the balancing process required . . . ." [A.P. 40a.]

It is incorrect to suppose that because the Commission must "consider the antitrust implications of an agreement before approving it" (*Federal Maritime Comm'n v. Seatrain Lines, Inc., supra,* 411 U.S. at 739) the Commission somehow has appreciably greater qualifications in applying the antitrust laws than it does the labor laws. The Commission's principal mission under section 15 is, with Congress' blessing, to provide antitrust exemptions for steamship rate conferences and to supervise the resulting cartelized rate-making. (*See* H.R. Rep. No. 498, 87th Cong. 1st Sess. 4-5, 13 (1961).) Under section 15 the Commission takes note of these per se antitrust violations and then proceeds to approve or disapprove such agreements, depending on whether a sufficient "transportation need" is shown to overcome the competitive restraint. (*See* 41 Fed. Reg. 51623, Rule 522.5(b) (Nov. 23, 1976) (codifying existing procedures); 46 C.F.R. § 522.5; *Agreement No. 8760-5,* 17 F.M.C. 61 (1973).) This process does not acquaint the Commission with the substance or the subtleties of the antitrust laws or steep it in the economic rationale and policy which the antitrust laws reflect.

The formal basis on which the Government rests its contention that the Commission has jurisdiction to determine labor exemption issues is the assertion that, conceptually, any exemption of collective bargaining agreements from section 15 can only be conferred by the Commission. Under

this view, a labor exemption is not compelled directly by national labor policy, as the court of appeals assumed, but rather depends upon the Commission's duty "to take account of" the antitrust laws in passing on section 15 agreements (Gov't Br. 28, 36). Since only the Commission has section 15 functions, presumably only the Commission can, by taking account of the antitrust laws, also "take account of" the labor exemption concept and therefore bestow a labor exemption from section 15. Correspondingly, the Government argues that the Commission thereby acquires primary jurisdiction to decide the labor exemption issue (Gov't Br. 53-54). However, a labor exemption from statutes governing competition in the marketplace is compelled directly by fundamental national labor policy, not something in the antitrust laws themselves, and the exemption is not something that only the Commission can bestow in giving weight to the antitrust laws as part of the section 15 approval process applied to particular agreements. If there were no antitrust laws to apply, labor policy would still compel the same exemption from section 15 which the court found here.[30]

The appropriate way to make certain that the labor exemption standards developed by this Court are actually applied, rather than loosely taken "account of" as part of an amalgam of unarticulated Shipping Act standards, is to provide that maritime collective bargaining agreements, like maritime agreements to merge or consolidate, are not subject to section 15 at all. They remain subject to attack before the courts under the antitrust laws to the same extent as labor agreements in all other industries.

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30. *Connell* explained that: "The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions" (421 U.S. at 622).

D. Pre-Implementation Approval of Collective Bargaining Agreements Is Inconsistent with Collective Bargaining Realities.

The section 15 pre-implementation approval process is a drastic interference with free collective bargaining and thus is different in kind from the application by the I.C.C. of its service requirements to regulated motor carriers, subjected to "hot cargo" clauses (*see* Gov't Br. 52-53; *compare Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93, 108-09 (1958)).

Before the Commission can exercise section 15 jurisdiction over a labor agreement by granting permanent or interim approval, it must first determine that it has jurisdiction. Admittedly, it lacks such jurisdiction over labor agreements unless it determines that the labor exemption applicable to such agreements is forfeited. Accordingly, in any instance in which a collective bargaining agreement is either filed for section 15 approval or challenged before the Commission as requiring approval, the Commission must first perform the difficult, delicate and necessarily time-consuming task of resolving the labor exemption question in a proceeding in which adversary interests have a right to be heard.

Pending resolution of this jurisdictional question either the collective bargaining is frustrated, as in the case of the nonmember provisions, or the parties risk section 15's large penalties by implementing the agreement. Voluntary submission to the Commission's jurisdiction in order to obtain an interim approval is inconsistent with resisting such jurisdiction and of course also risks a disapproval or a Commission-imposed modification of all or part of the bargain. In any event, voluntary submission to Commission jurisdiction to obtain an interim approval and an antitrust exception cannot itself confer subject matter jurisdiction, and the Commission would still have to make the lengthy

and difficult threshold labor exemption determination (*see* Gov't Br. 40).

Given the immense national economic consequences that flow from transportation industry labor stoppages, if a labor stoppage exists or is imminent when an agreement comes before the Commission, the section 15 pre-implmentation approval requirement necessarily means decision-making under circumstances ill suited to judicious determination of difficult policy questions. However, where it seems that the union will not make a "walk-out" issue of particular provisions, any sense of urgency is lost, and the parties are denied the benefits of their collective bargaining for years. Either alternative is an extraordinarily poorly conceived way to resolve labor exemption questions and will encourage negotiating parties to believe that the only way to remove an irrational obstacle to resolution of labor disputes is to allow a crisis to develop.

When collective bargaining issues are resolved by the parties, it is axiomatic that the bargain, in its entirety, must be implemented forthwith, so that labor disruption can be immediately terminated. Use of section 15 to resolve labor exemption questions does not fit and cannot be made to fit the realities of collective bargaining, as the court of appeals recognized. With or without "interim" approvals from the Commission, conferred pendente lite after a determination of jurisdiction, the section 15 process is far too slow and uncertain. Here, provisions negotiated in 1972 and revised and reincorporated in successive collective bargaining agreements have yet to be implemented. The remainder of the PCLCA, which had to be implemented despite the Commission's challenge to its section 15 status, has been renegotiated twice during the pendency of the case, yet did not even receive an explicit jurisdictional ruling in the Commission's 1975 decision. The *Boston II* jurisdictional ruling took three years. In *New York Shipping*, where the parties finally agreed to an interim approval on the basis of a refund of assessments if the agreement were later disapproved, nearly a year elapsed between placement of the agreement before the Commission and the interim approval. (*See New York Shipping Ass'n v. Federal Maritime Commission, supra,* 495 F.2d at 1218 and the Commission's decision therein, 16 F.M.C. 381 (1973).)

Nonetheless, the Government urges a lack of "empirical data" supporting the court of appeals' conclusion that placing jurisdiction over labor exemption issues in the Commission under section 15 would be inconsistent with labor policy (Gov't Br. 20). It is true that the industry has yet to experience a pre-implementation approval regimen in its collective bargaining, but surely it is not necessary to await the occurrence of self-evident consequences to conclude that collective bargaining is incompatible with the section 15 process. Not once was the Commission able to act promptly in the three instances in which collective bargaining agreements were before it. These delays are intolerable in a collective bargaining context.

Even apart from the necessity of time consuming resolution of labor exemption questions before proceeding to questions of approvability threshold, delays are unavoidable in obtaining section 15 approval even if the agreement is clearly subject to the Act and is unopposed.[31] If protests

31. The Commission requires that agreements first be reduced to writing and executed by all parties or by persons who can demonstrate authority to sign on the parties' behalf—no small task with industry-wide bargaining on a coast covering three western states. An original and 15 copies must be transmitted to the Commission's Washington headquarters with a formal request for section 15 approval accompanied by a memorandum and affidavits demonstrating either the consistency of the agreement with the Act, together with its transportation need, or the absence of Commission jurisdiction. (46 C.F.R. Part 522 and current practice codified in proposed amendments to these rules, 41 Fed. Reg. 51622-23 (Nov. 23, 1976).) Virtually all collective bargaining contracts have expiration dates. The Commission's rules require applications to modify or extend

are received they must be evaluated and the issues or factual contentions at least preliminarily resolved before a decision can be made respecting interim approval.[32] Further, a protest to an urgently needed agreement puts a protestant in a position to extract substantial concessions as the price of a withdrawal of opposition, hardly a process in which collective bargaining issues will be rationally resolved.

As *Boston I* demonstrates, it cannot be assumed that the section 15 problem can be confined to only a few collective bargaining agreements. Realistically, any new Commission assertion of jurisdiction over collective bargaining provisions makes arguable cases of many more agreements presenting potentially analogous problems. Since the penalties for guessing wrong as to section 15 consequences can be massive, section 15 uncertainty of any kind tends to defeat resolution of labor disputes.[33]

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already approved agreements to be filed no less than 60 days before the expiration date (46 C.F.R. Part 521). It would be a rare collective bargaining agreement that could meet this requirement. Commission staff must process the agreement, prepare a summary thereof for the Federal Register, and publish notice inviting public comment or protests. Even if no protests or objections are received, if the staff is able to act expeditiously in preparing its recommendations, if the matter can be placed on the Commission's usually weekly docket and if the Commission has a quorum on that occasion, at best no interim or other approval could be expected in less than 60 days. Delays of many months are commonplace in obtaining approval of entirely unopposed section 15 agreements.

32. *See Marine Space Enclosures, Inc. v. Federal Maritime Comm'n*, 420 F.2d 577 (D.C. Cir. 1969). The Government believes that jurisdictional "rulings will alleviate the time problems posed by collective bargaining" (Gov't Br. 29). It is unclear, however, how labor exemption issues can be resolved on the basis of a request for a ruling or, if so, why these would go any faster than the normal section 15 process. Normally, the Commission gives Federal Register notice of requests for rulings, permits wide comment thereon and then lapses into silence for months before any ruling issues.

33. The pre-approval implementation penalties of section 15 themselves have a significantly adverse effect on collective bargaining. Section 15 penalties up to $1,000 per day flow for failing to file agreements even apart from whether the agreements are ultimately approvable.

For practical reasons of profound significance for collective bargaining, it makes sense to draw the line between collective bargaining and other types of maritime agreements as this Court did in *Volkswagen* and the court of appeals did here. Since persons allegedly injured would have the same antitrust remedies available as in the case of all other industries, it is difficult to see what real objections exist to this course.

E. An Antitrust Forum Is More Consistent with National Labor Policy.

Although collective bargaining provisions may involve such severe restraints on marketplace competition as to forfeit the labor exemption, the restraints may still not constitute substantive violations of the antitrust laws.[34] Moreover, the plaintiff in a court case has the burden of convincing the trier of fact of the elements of the offense and of the extent of his injuries. By contrast, under section 15, upon a finding that the labor exemption is forfeited, the collective bargaining provisions are brought permanently into a context where the provisions cannot be carried out or further amended without prior Commission approval in a proceeding in which the burden of demonstrating approvability falls on the proponents.

Unlike an antitrust court, the Commission would have power under section 15 to compel the modification of labor agreements filed with it so that deals at the bargaining table may be changed by an administrative agency which lacks any understanding of labor relations (*see* 46 C.F.R. § 522.7). Even a party to the labor agreement could ask the agency to reject or modify provisions it had reluctantly conceded at the bargaining table.

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34. Gov't Br. 40; in *Connell*, despite the Court's conclusion that severe anticompetitive restraints existed, the matter was remanded for trial on the merits of the antitrust claims.

Approval of labor agreements by the Commission is only the beginning of section 15 problems. PMA and ILWU jointly employ a labor arbitrator. Unlike an antitrust court, the Commission has responsibility for interpreting and resolving disputes under section 15 agreements, and if the Commission assumes jurisdiction, the arbitrator's role in adjusting disputes and in interpreting collective bargaining provisions will be displaced or reduced to an advisory opinion for the Commission to dispose of when and as it pleases.

Collective bargaining agreements are often left vague to paper over areas where overly fine definitions might make resolution of a dispute difficult or impossible. By contrast, the Commission requires section 15 agreements to be specific and unambiguous and to set forth in sufficient detail how they are to work so that any person reading the agreement can understand how it will be applied.[35]

Section 15 requires that in the case of informal "understandings" between the parties, a memorandum thereof be filed for approval as a section 15 agreement. It is, of course, unlawful to modify an approved section 15 agreement without further approval. Yet collective bargaining agreements are constantly the subject of grievance procedures which interpret them and to various informal understandings, historical practices and differing local interpretations. Section 15 approval of a collective bargaining agreement does not end the parties' problems; it creates an entirely new scheme of governmental supervision and second-guessing at odds with national labor policy.

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35. *Joint Agreement—Far East Conference and Pacific Westbound Conference*, 8 F.M.C. 553, 558 (1965), *aff'd sub nom. Pacific Westbound Conference v. Federal Maritime Comm'n*, 440 F.2d 1303 (5th Cir.), *cert. denied*, 404 U.S. 881 (1971).

II. The Court Correctly Concluded that the Nonmember Provisions Did Not Forfeit a Labor Exemption from Section 15.

A. Resolution of Labor Exemption Issues Is Not Committed to the Commission's Discretion.

Despite the NLRB's expertise on issues lying at the heart of the labor exemption cases, this Court has rejected NLRB primary jurisdiction and with it any contention that the balancing of statutory policies is a matter within an agency's discretion, reversible only for abuse of discretion. Labor and antitrust cases are the regular business of courts and are not cases raising

> "issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion." [*Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. at 685 (Opinion of Mr. Justice White); *accord, Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra*, 421 U.S. at 626-35.]

The Government asserts, however, that, as a consequence of its position that jurisdiction to determine labor exemptions lies in the Commission, "the role of the reviewing court necessarily is limited" to determining whether "the Commission abused its discretion" (Gov't Br. 41), that "the court [of appeals] impermissibly trenched on an area *Congress assigned primarily to the Commission*" (Gov't Br. 26 [emphasis supplied]), and therefore the court erred in "itself undertaking to balance the competing interests" (Gov't Br. 41).

If severely circumscribed judicial review is the consequence of vesting jurisdiction in the Commission, it argues powerfully for withholding such jurisdiction from the Commission in the first place. The Government's position comes dangerously close to urging that Commission determinations of labor exemption issues are virtually unreviewable. This Court has never limited its review of labor exemption

issues to whether the trier of fact abused its discretion, and they are the last issues that should be so treated. Deference to agency discretion or expertise assumes agency jurisdiction and expertise in the first place. If labor exemption determinations are made by an agency without special competence and having no statutory mandate to enforce the labor laws or the antitrust laws or to resolve collisions between them, the need for full and careful judicial review of the result is all the greater. (*See Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960).)

B. The Court's Ruling Was Compelled by the Commission's Own Findings.

The court of appeals' ruling that, balancing labor and Shipping Act interests, the nonmember provisions were exempt from section 15 was based on the Commission's own summary of the nonmembers' contentions that the motive for the provisions was "to bring nonmembers into the PMA camp" (A.P. 62a) and to put PMA in a position of "controlling labor policies of nonmembers" (A.P. 65a). The court necessarily concluded that such contentions were in essence a claim of an unfair labor practice under the NLRA and "at worst" presented "*Pennington* considerations" for an antitrust court (A.P. 36a-37a).

Other than the Commission's recitation of its ultimate conclusion that on balance the provisions presented primarily Shipping Act questions, the only Commission "finding" necessarily rejected by the court was that the nonmember provisions were factually similar to those in *Volkswagen* (A.P. 54a), a general finding so far not defended by the Government here and plainly erroneous. (*See* Argument, section I-B, *supra.*)

Overruling an ultimate conclusion of law and policy is not a failure to apply a substantial evidence test or a failure to give deference to the agency's judgment on matters

within its expertise. Allegations of imposition of an improper employer bargaining unit do not raise Shipping Act questions or impinge on Shipping Act policies. In the absence of *Volkswagen*-type effects on regulated rates, there is not even a significant Shipping Act nexus, although, as the collective bargaining history shows, the nonmember provisions do represent strong labor considerations (A.P. 38a).

III. The Collective Bargaining Provisions Did Not Forfeit the Labor Exemption Under This Court's Decisions.

A. No Findings or Evidence that the Terms Had Substantial Antitrust Effects on the Business Market.

Since the development of the labor exemption, no case before this Court until now has presented a challenge to a labor agreement's exemption from the antitrust laws in the absence of terms which, if imposed on other employers, would themselves constitute a

> "direct restraint on the business market [which] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." [*Connell, supra,* 421 U.S. at 625; *see Apex Hosiery Co. v. Leader,* 310 U.S. 469, 512-13 (1940).][36]

Although a threshold finding that the terms under attack constituted serious antitrust violations is an essential prerequisite to a forfeiture of a labor exemption, neither the Commission's four "criteria" nor its decision here adverted

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36. *See Federation of Musicians v. Carroll,* 391 U.S. 99 (1968) (price fixing); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965) (ruinous costs); *Local 189, Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965) (restrictions on marketing hours); *Allen Bradley Co. v. Electrical Workers Local 3,* 325 U.S. 797 (1945) (price fixing, monopoly, division of markets); *Teamsters Local 24 v. Oliver, supra; National Woodwork Mfgs. Ass'n v. NLRB,* 388 U.S. 612 (1967); St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law,* 62 U. Va. L. Rev. 603, 606 (1976).

to any need for such an analysis (see A.P. 58a). Except for a general recitation in its conclusion (A.P. 72a-73a), the Commission made no determination that the terms themselves, if accepted by the nonmember ports, had substantial or even any effects on competition. Instead, the Commission's findings were based on effects on nonmember ports if they did *not* accept the terms and thereby gave up the right to employ the ILWU-PMA jointly registered work force and to participate in the ILWU-PMA fringe plans (A.P. 70a-71a, *see* App. 51-61). Logically, these findings relate only to whether the nonmember terms were, as a practical matter, imposed, not to any assessment of the competitive consequences of the terms themselves or consequences to nonmembers accepting them.

In the case of a shared labor force or other joint industry resource, the more valuable that resource is as compared to other alternatives, the more any terms or conditions attached to its use will, as a practical matter, be terms which those using the resource will probably decide they have to accept. However, none of the labor exemption cases suggests that the exemption is forfeited simply because employers outside the employers' unit believe they have no choice but to accept terms which do not themselves create anticompetitive effects in the marketplace. If the Commission is correct that the test for forfeiture of a labor exemption is whether terms are imposed, because bleak consequences are anticipated for an employer electing to do without the shared labor force, then *any* collectively bargained condition placed on use of the work force, no matter how innocuous or equal in impact, would forfeit the labor exemption. Yet there must be some terms for nonmember participation in the ILWU-PMA plans and work force, and if they do not create significant competitive restraints on the marketplace, there is no reason why they should forfeit the exemption.

In *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 409-11 (1912) and related cases,[37] the relief ordered by the Court to correct an antitrust violation arising from exclusion of a competitor from a non-labor industry joint resource provided for admission of outsiders

> "upon such just and reasonable terms as shall place such applying company *upon a plane of equality in respect of benefits and burdens* with the present proprietary companies." [224 U.S. at 411 (emphasis supplied).]

Terminal Railroad required that, as here, all expenses and charges be *equally* borne by all who wished to use the terminal facilities. Accordingly, even assuming, as the Commission did, that there was no reasonably achievable alternative to nonmember use of the ILWU-PMA jointly registered work force, there is no substantive antitrust requirement that PMA and ILWU allow others to participate in access to this resource on *more* advantageous terms than members.

If accepted by the nonmember ports, it is clear that the present terms would place PMA members and nonmembers using the registered work force on a more equal plane of burdens and benefits as to labor costs and as to work force access (App. 291-93, 207, 210, *see* A.P. 55a-56a).[38] There

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37. *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Associated Press v. United States*, 326 U.S. 1 (1945).

38. Collective bargaining, especially on a multi-employer basis, inherently involves equalization of costs and other competitive "edges" based on labor terms. The creation of a labor exemption in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503-04 (1940) and in *United States v. Hutcheson*, 312 U.S. 219, 230-31 (1941) correctly assumed that collective bargaining would inevitably reduce or eliminate competitive advantages of employers based on labor costs, whether the terms be wages, hours of work, or, as here, access to labor on terms more favorable than other employers. *(See Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra*, 421 U.S. at 622 and Harlan J., concurring in *Volkswagen*, 390 U.S. at 284 (1968).)

are no findings assessing anticompetitive effects in the marketplace, if any, which would flow from greater equality of labor costs and labor access. Although, during strike or lockout, all employers would lose access to the registered work force, there were no findings assessing the effect on competition, if any, with PMA members. Even assuming severe anticompetitive effects, however, provisions tending to create employer solidarity during strike or lockout are intrinsically labor policy matters, not antitrust violations. (*See NLRB v. Truck Drivers' Local 449*, 353 U.S. 87, 96 (1957); *Clune v. Publishers' Ass'n*, 214 F. Supp. 520 (S.D.N.Y.), *aff'd per curiam*, 314 F.2d 343 (2d Cir. 1963).)

In view of the absence of findings of significant effects of the nonmember terms on competition in the marketplace, in the event the terms were accepted by nonmembers, the Government's Brief attempts to create the equivalent of such findings, principally by describing what it candidly admits are contentions (Gov't Br. 12) that advantageous provisions in "local" contracts between ILWU and nonmember ports would be abrogated. Three examples of such contentions are cited by the Government as showing "resultant higher costs to port users" flowing from the nonmember terms (Gov't Br. 12). Each contention, however, was made by the nonmember ports in an affidavit submitted prior to the elimination of the Note to clause 3 of the 1972 agreement which the ports had contended caused all local agreements to be abrogated (App. 46-61; *compare* App. 261-62 "Note" *with* App. 291, clauses 2 and 3; *see* App. 204).[39]

39. Elimination of the Note to clause 3 necessarily removed from contention all the items referred to as examples of competitive effects of the Agreement described in footnote 16 of the Government's Brief. The nonmember ports' affidavit filed after this amendment did not controvert PMA's testimony that elimination of the Note had eliminated the "abrogation of local contracts" issue (*compare* App. 204 *with* App. 219-21) and the ports' supplemented pleading (App. 189-93) did not address elimination of that Note or its effect. The Commission's decision failed to address the effect of elimination of the Note to clause 3 of the 1972 provisions on these examples, which had been supplied by the nonmembers to show instances of abrogation of local contract provisions *before* the Note was eliminated. Instead the Commission stated generally that the revised agreement was substantially the same as the 1972 agreement and proceeded to read the 1973 version as if the Note to clause 3 were still there (A.P. 47a-48a). PMA's appeal attacked this reading of the agreement. Although the court of appeals noted that PMA "has strongly contested" this finding (A.P. 5a, n.5, 36a, n.34), the court did not resolve this question because it was unnecessary to the court's disposition of the case. In any event, the verified statement of PMA's president that the nonmember provisions did not abrogate such local contract advantages (App. 204; *see* App. 91) and a similar statement by ILWU (App. 123) would preclude any later contention by them that the nonmember provisions were inconsistent with continuation of any local contract terms other than those inconsistent with terms of the nonmember agreement itself or the PCLCA's provisions for admission to registration.

The 1973 provisions state only that a nonmember's:

> "separate ILWU contract must conform *with the provisions hereof, and the provisions of the PCLCA governing the selection of men for inclusion in the joint work force.*" [App. 291, clause 2. (emphasis supplied).]

The clause does not admit of the Government's contention that a nonmember's "local" contract with ILWU is abrogated if it is inconsistent with any PCLCA provisions. Nothing in the nonmember provisions is inconsistent with continuance of the local contract provisions to which the Government refers.

B. PMA's Mandatory Duty to Bargain with ILWU on Nonmember Participation.

Even collective bargaining provisions involving price fixing, market restrictions or other serious antitrust violations may fall within the labor exemption if the terms have a "substantial effect" on subjects of labor concern such as hours of work or wages (*Federation of Musicians v. Carroll*, 391 U.S. 99, 112 (1968)), or, the terms are:

> "so intimately related to wages, hours and working conditions [i.e., mandatory subjects of bargaining] that the union's successful attempt to obtain that pro-

> vision through bona fide, arm's-length bargaining [is] in pursuit of their own labor union policies, and not at the behest of or in combination with non-labor groups . . ." [*Local 189, Meat Cutters v. Jewel Tea Co., supra,* 381 U.S. at 689-90 (Opinion of Mr. Justice White).]

PMA had a mandatory duty to bargain with ILWU on ILWU's demand that nonmembers be permitted to participate as of right in the industry-wide fringe programs (App. 88). The Government's concession that PMA could not implement its Board's resolution to terminate nonmember participation "because it would require union concurrence" (Gov't Br. 9) and the history of bargaining on the subject[40] (App. 93, 98, 101, 122-23) compels this conclusion. The union, in insisting that the ILWU-PMA fringe plans be opened to nonmembers as a matter of right, was advancing a proper economic interest of the dockworkers it represented, who themselves were employees of PMA members. As the bargaining history set forth in the Counter Statement of the Case shows, participation makes it possible for nonmembers to provide identical benefits to registered dockworkers through the identical industry mechanisms, regardless of where these men work. Collection of employer contributions is then policed by the existing ILWU-PMA plan administrative machinery and through PMA payroll and related statistical institutions. Payment of these benefits is guaranteed by the industry as a whole and is not jeopardized by individual business failures common among small businesses such as stevedoring concerns. Moreover, participation through PMA's mechanisms

40. *Hinson v. NLRB,* 428 F.2d 133 (8th Cir. 1970); *NLRB v. Houston Chapter, Assoc. Gen. Contractors of America, Inc.,* 349 F.2d 449 (5th Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966); *Inland Steel Co. v. NLRB,* 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960 (1949); *see Fibreboard Paper Prod. Corp. v. NLRB,* 379 U.S. 203 (1964).

generally reduces overhead and administration costs for an employer, making it easier to pay the benefits (App. 93, 103). The Commission erred in assuming that ILWU had no interest in the terms, a conclusion that the court found "highly questionable" (A.P. 3a, n.1).

Even apart from fringe benefit issues, the terms were of direct concern to ILWU. Joint control of dockworker registration and control through the joint dispatch halls over assignment to particular nonmember jobs, as provided in clause 3, is critical to ILWU. After the long history of ILWU efforts to reduce steady men, the Commission's assertion that ILWU had "no interest" in clause 5's provisions putting member and nonmember employers of registered steady men on an equal basis is not credible. (*See Waterfront Employers Ass'n, supra,* 26 War. Lab. Bd. Rep. at 537-38, 565.)

Although PMA had a duty to bargain on the ILWU opening demand, PMA was under no obligation simply to grant the demand, and was entitled to bargain as to PMA's version of equal access terms on which such participation would be permitted. Contrary to the Commission's assumption (A.P. 55a), terms are not less mandatory because urged by management.[41]

The Commission assumed that the nonmember provisions did not concern mandatory bargaining subjects because the provisions were not addressed to the labor relations of PMA "vis-a-vis [its] own employees" and because the provisions would have an effect on labor relations between ILWU and nonmember ports using the registered work force (A.P. 59a-62a). Yet registered dockworkers *are* employees of PMA members, although at times they are also employees of nonmember participants who accept the non-

41. *Dolly Madison Industries Inc. & Teamsters Local 592,* 182 N.L.R.B. 1037 (1970); *United Electrical Workers v. NLRB,* 409 F.2d 150 (D.C. Cir. 1969); *American National Insurance Co. v. NLRB,* 187 F.2d 307 (5th Cir. 1951), *aff'd* 343 U.S. 395 (1952).

member terms, and the ability of these employees to get credit under the ILWU-PMA plans when working for nonmembers was of the essence of the provisions in question. Even assuming, as the Commission did, that the nonmember provisions solely affected relationships between nonmembers and non-PMA employers, this was not a proper ground on which to revoke a labor exemption for terms dealing with subjects on which either party could compel the other to bargain. In *Jewel Tea* this Court upheld a labor exemption as to terms restricting marketing hours, which had been negotiated with one set of employers and actually imposed on another by the union. The *Jewel Tea* agreement between the union and the employer group contained an unusually stringent "most favored nation" clause which the district court had found precluded the union from entering into any more favorable contract governing relations between Jewel and its employees.[42] Notwithstanding the significant adverse impact of the *Jewel Tea* terms on competition in the marketplace and the union's actual imposition of the terms, the labor exemption was preserved because the terms were sufficiently related to proper labor objectives. In the instant case the terms have no adverse competitive effect on the marketplace and are themselves mandatory bargaining subjects.

C. The Commission Erred in Denying a Labor Exemption Without an Agreement by Which the Union Undertook to Impose Impermissible Terms.

In *Pennington* the Court stressed that it must be "clearly shown" that the union "has agreed with one set of employers to impose" impermissible terms on another set.

42. *Jewel Tea Co. v. Local 189 Meat Cutters*, 215 F. Supp. 839, 842 (N.D. Ill. 1963); *see* 381 U.S. at 683. Most favored nation clauses in collective bargaining contracts are themselves mandatory bargaining terms, if demanded by an employer. (*Dolly Madison Industries Inc. & Teamsters Local 592*, 182 N.L.R.B. 1037 (1970); *see* St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, *supra*, n.36 at 612-14).

(*United Mine Workers v. Pennington*, 381 U.S. 657, 665 (1965).) The present case is like *Jewel Tea* in that, as Mr. Justice White's opinion stressed, the case comes to the Court without findings or proof of the necessary labor-management conspiracy by which the union undertakes to impose the terms.[43] (*Local 189, Meat Cutters v. Jewel Tea Co., supra*, 381 U.S. at 682-83; *Ramsey v. United Mine Workers*, 401 U.S. 302, 313 (1971); *Allen Bradley Co. v. Electrical Workers Local 3, supra*, 325 U.S. at 799-800).

The Commission dispensed with the *Pennington/Jewel Tea/Allen Bradley* requirement of a conspiracy or other agreement by which the union would impose the terms (A.P. 69a), believing such an agreement to be unnecessary in view of its finding that nonmembers had little practical alternative to using the ILWU-PMA registered work force and its finding that ILWU would probably resist work force alternatives (A.P. 70a-71a). The essence of the conspiracy requirement, however, is that while unions are free to impose labor-related conditions on employers which may severely impinge on an employer's ability to compete, they should not do so as a cat's paw of the employer's competitors and by pre-arrangement with them. The antitrust laws do not exist to protect employers from a unilateral union position taken in what the union conceives to be its

43. The requirement of a clear showing of a conspiracy to impose non-labor terms appears to have been the analytical basis on which the Opinion distinguished a "most favored nation" clause from impermissible agreements to impose terms having anticompetitive consequences. Most favored nation clauses are designed to assure that no competitive "edge" will occur as a result of bargaining with other employers, usually those outside the employer bargaining unit. The clause typically provides that any more favorable terms given other employers will be given retroactively to the bargaining employers. Such clauses promote the settlement of industrial disputes by giving the first set of employers the assurance there will be no favoritism shown in subsequent bargaining with other employers affecting the ability to compete. (*See* St. Antoine, *supra*, n.42.)

own interests. Here there was no provision or understanding precluding ILWU and the nonmember ports from bargaining any alternative work force arrangements or terms or conditions of employment that they may wish, including terms sufficiently attractive to cause registered dockworkers to switch from the PMA work force to a nonmember work force. So long as ILWU has not agreed with PMA to refuse to so bargain, ILWU is acting within the labor exemption no matter how obstinately it might choose to resist such alternatives as inconsistent with ILWU's view of its members' interests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

NATIONAL LONGSHOREMEN'S BOARD: ARBITRATORS' AWARD[1]

In the Matter of the Arbitration Between Pacific Coast District Local 38 of the International Longshoremen's Association, Acting on Behalf of the Various Locals Whose Members Perform Longshore Labor and Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers' Union of San Francisco and Marine Service Bureau of Los Angeles.

This award is made pursuant to agreement dated the 7th day of August, 1934, between the above named parties, which agreement is hereby referred to and made a part hereof.

Said agreement provides that the decision of the arbitrators (which shall be in writing and must be by a majority) shall constitute a series of agreements between the International Longshoremen's Association, acting on behalf of various locals whose members perform longshore labor, first party, on the one hand, and Waterfront Employers of Seattle, a list of the members of which is attached to said agreement, marked Exhibit "A", second party, Waterfront Employers of Portland, a list of the members of which is attached to said agreement, marked Exhibit "B", third party, Waterfront Employers' Union of San Francisco, a list of the members of which is attached to said agreement, marked Exhibit "C", fourth party, and Marine Service Bureau of Los Angeles, a list of the members of which is attached to said agreement, marked Exhibit "D", fifth party, separately, on the other hand, which shall be binding upon each of said parties as aforesaid for the period to and including September 30, 1935, and which shall be considered as renewed from year to year thereafter between the respective parties unless either party to the respective agreements shall give written notice to the other of its desire to modify or terminate the same, said notice to be given at least forty (40) days prior to the expiration date. If such notice shall be given by any party

1. Text set forth in Keller, *supra* pp. 122-27.

other than the International Longshoremen's Association, first party, then the International Longshoremen's Association shall have fifteen (15) days thereafter within which it may give written notice of termination of all of said agreements whereon on the succeeding September 30th, all of said agreements shall terminate. If such notice or notices are not so given the agreement shall be deemed to be renewed for the succeeding year.

The arbitrators decide and award as follows:

Section 1. Longshore work is all handling of cargo in its transfer from vessel to first place of rest including sorting and piling of cargo on the dock, and the direct transfer of cargo from vessel to railroad car or barge and vice versa.

The following occupations are included in longshore work: Longshoremen, gang bosses, hatch tenders, winch drivers, donkey drivers, boom men, burton men, sack-turners, side runners, front men, jitney drivers, and any other person doing longshore work as defined in this section.

Section 2. Six hours shall constitute a day's work. Thirty hours shall constitute a week's work, averaged over a period of four weeks. The first six hours worked between the hours of 8 AM and 5 PM shall be designated as straight time. All work in excess of six hours between the hours of 8 AM and 5 PM, and all work during meal time and between 5 PM and 8 AM on week days and from 5 PM on Saturday to 8 AM on Monday, and all work on legal holidays, shall be designated as overtime. Meal time shall be any one hour between 11 AM and 1 PM. When men are required to work more than five consecutive hours without an opportunity to eat, they shall be paid time and one-half of the straight or overtime rate, as the case may be, for all the time worked in excess of five hours without a meal hour.

Section 3.

(a) The basic rate of pay for longshore work shall not be less than $0.95 (ninety-five cents) per hour for straight time, nor less than $1.40 (one dollar and forty cents) per hour for overtime, provided, however, that for work which is now paid higher than the present basic rates, the differentials above the present basic rates shall be added to the basic rates established in this paragraph (a).

(b) For those classifications of penalty cargo for which differentials are now paid above the present basic rates, the same differentials above the basic rates established by this award shall be maintained and paid;

(c) For shoveling, shoveling bones in bulk, both non-offensive and offensive, ten cents above the basic rate shall be paid in Los Angeles;

(d) For handling creosote and creosote wood products, green hides, and fertilizer, for which a differential of ten cents above the present basic rates is now allowed in Los Angeles to foremen, the same differential of ten cents shall also be paid in Los Angeles to men handling these commodities;

(e) For handling logs, piles and lumber which have been submerged, when loaded from water, ten cents above the basic rates established by this award shall be paid for thirty tons or over in Portland;

(f) The increases in the rates of pay established by this award shall be paid as of July 31, 1934.

Section 4. The hiring of all longshoremen shall be through halls maintained and operated jointly by the International Longshoremen's Association, Pacific Coast District, and the respective employers' associations. The hiring and dispatching of all longshoremen shall be done through one central hiring hall in each of the ports of Seattle, Portland, San Francisco and Los Angeles, with such branch halls as the Labor Relations Committee, provided for in Section 9, shall decide. All expense of the hiring halls shall be borne one-half by the International Longshoremen's Association and one-half by the employers. Each longshoreman registered at any hiring hall who is not a member of the International Longshoremen's Association shall pay to the Labor Relations Committee toward the support of the hall a sum equal to the pro rata share of the expense of the support of the hall paid by each member of the International Longshoremen's Association.

Section 5. The personnel for each hiring hall shall be determined and appointed by the Labor Relations Committee for the port, except that the dispatcher shall be selected by the International Longshoremen's Association.

Section 6. All longshoremen shall be dispatched without favoritism or discrimination, regardless of union or non-union membership.

Section 7. The Labor Relations Committee on Seattle, Portland and Los Angeles, where hiring halls now exist, shall decide within twenty days from the date of this award whether a hiring hall now in use shall be utilized. If in any of said ports no decision is made within such twenty days, a new hall shall be established in such port within thirty days from the date of this award.

Section 8. The hiring and dispatching of longshoremen in all the ports covered by this award other than those mentioned in Section 4, and excepting Tacoma, shall be done as provided for the ports mentioned in Section 4; unless the Labor Relations Committee in any of such ports establishes other methods of hiring or dispatching.

Section 9. The parties shall immediately establish for each port affected by this award, a Labor Relations Committee to be composed of three representatives designated by the employers' association of that port and three representatives designated by the International Longshoremen's Association. By mutual consent the Labor Relations Committee in each port may change the number of representatives from the International Longshoremen's Association and the employers' association. In the event that such committee fails to agree on any matter, they may refer such matter for decision to any person or persons mutually acceptable to them, or they shall refer such matter, on request of either party, for decision to an arbitrator, who shall be designated by the Secretary of Labor of the United States or by any person authorized by the Secretary to designate such arbitrator. Such arbitrator shall be paid by the International Longshoremen's Association and by the employers' association in each port. Nothing in this section shall be construed to prevent the Labor Relations

Committee from agreeing upon other means of deciding matters upon which there has been disagreement.

Section 10. The duties of the Labor Relations Committee shall be:

(a) To maintain and operate the hiring hall;

(b) Within thirty days from the date of this award to prepare a list of the regular longshoremen of the port, and after such thirty days no longshoreman not on such list shall be dispatched from the hiring hall or employed by any employer while there is any man on the registered list qualified, ready and willing to do the work. No one shall be registered as a longshoreman who did not, during a period of three years immediately preceding May 9, 1934, derive his livelihood from the industry during not less than any twelve months. Pending the preparation of these lists, no longshoreman who was a member of a gang or who was on any registered list or extra list between January 1, 1934, and May 9, 1934, shall be denied the opportunity of employment in the industry. The Labor Relations Committee, in registering longshoremen, may depart from this particular rule;

(c) To decide questions regarding rotation of gangs and extra men; revision of existing lists of extra men and of casuals; and the addition of new men to the industry when needed;

(d) To investigate and adjudicate all grievances and disputes relating to working conditions;

(e) To decide all grievances relating to discharges. The hearing and investigation of grievances relating to discharges shall be given preference over all other business before the committee. In case of discharge without sufficient cause, the committee may order payment for lost time or reinstatement with or without payment for lost time;

(f) To decide any other question of mutual concern relating to the industry and not covered by this award.

The committee shall meet at any time within twenty-four hours, upon a written notice from either party stating the purpose of the meeting.

Section 11.

(a) The Labor Relations Committee for each port shall determine the organization of gangs and methods of dispatching. Subject to this provision and to the limitations of hours fixed in this award, the employers shall have the right to have dispatched to them, when available, the gangs in their opinion best qualified to do their work. Subject to the foregoing provisions gangs and men not assigned to gangs shall be so dispatched as to equalize their earnings as nearly as practicable, having regard to their qualifications for the work they are required to do. The employers shall be free to select their men within those eligible under the policies jointly determined, and the men likewise shall be free to select their jobs;

(b) The employees must perform all work as ordered by the employer. Any grievance resulting from the manner in which the work is ordered to be performed shall be dealt with as provided in Section 10;

(c) The employer shall have the right to discharge any man for incompetence, insubordination or failure to perform the work as required. If any man feels that he has been unjustly discharged, his grievance shall be dealt with as provided in Section 10;

(d) The employer shall be free, without interference or restraint from the International Longshoremen's Association, to introduce labor saving devices and to institute such methods of discharging and loading cargo as he considers best suited to the conduct of his business, provided such methods of discharging and loading are not inimical to the safety or health of the employees.

(Signed) Edward J. Hanna, Chairman
(Signed) Edward F. McGrady

I concur except as to the provisions of Section 3.
(Signed) O. K. Cushing

Dated this 12th day of October, 1934
At San Francisco, California.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Brief for Respondent Pacific Maritime Association upon all parties by causing three (3) copies thereof to be mailed, postage pre-paid and properly addressed, to counsel of record for each party.

Executed this 20th day of September, 1977 at San Francisco, California.

R. Frederic Fisher